(2)

No. 95-42

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

A. UBERTI & C.,

Petitioner,

v.

SUPERIOR COURT OF ARIZONA IN AND FOR THE COUNTY OF PIMA; HON. JOHN M. LEONARDO, JUDGE (THOMAS AND DELIA CORDOVA, REAL PARTIES IN INTEREST),

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION

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1995

QUESTION PRESENTED

Did the Arizona Supreme Court correctly find that Petitioner A. Uberti & C. had sufficient minimum contacts with the State of Arizona so that due process permitted Arizona to exercise personal jurisdiction that required the Defendant to answer for the harm its product caused in Arizona?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

AUTHORITIES CITED iii

STATEMENT OF THE CASE 1

I. Proceedings Below 1

II. Facts Established 1

REASONS FOR DENYING THE WRIT 2

CONCLUSION 5

AUTHORITIES CITED

Page

CASES:

Asahi Metal Industry v. Superior Court, 480 U.S. 102 (1986) 3, 4, 5

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 3

STATUTES AND RULES:

Rule 4.2(a) Arizona Rules of Civil Procedure 2

STATEMENT OF THE CASE

I. Proceedings Below.

Petitioner's statement of the proceedings below accurately sets forth the history of the case.

II. Facts Established.

Petitioner has taken great liberty in expanding actual facts established by the Court of Appeals and Supreme Court of the State of Arizona.

Of importance is Petitioner's acknowledgement that the firearm in question was manufactured by the Petitioner to Iver Johnson's specifications. The record below as provided to the Court by Petitioner demonstrates that in a nationally distributed gun digest magazine, the Iver Johnson Cattleman (the gun in question) was listed. (See Appendix A, page 1; See Petitioner's Appendix C-24, footnote 9)

While the Defendant takes the position that Iver Johnson had no contractual arrangement with Uberti regarding any subsequent retailing or distribution activities, the record is clear that Uberti was actively involved in the marketing of its firearms in the United States of America during the 1974-1975 time frame. In fact, Uberti would send its own workmen to the United States to perform warranty repairs on the firearms, and Aldo Uberti himself visited Fitchburg, Massachusetts numerous times. (See Appendix B, Imperato Deposition, See Appendix C, Thibodeau Deposition)

Overlooked is the fact that the Court was given ample evidence that the weapon in question contains

serious manufacturing defects. (See Appendix D, Martin Affidavit)

Petitioner is correct that the long-arm jurisdiction of Arizona courts found in Rule 4.2(a) of the Arizona Rules of Civil Procedure asserts jurisdiction to the maximum extent permitted by the Constitution of the State of Arizona and the Constitution of the United States of America. This was adequately discussed by the Arizona Supreme Court with a finding that asserting jurisdiction against Petitioner A. Uberti & C. did not violate state or federal due process limitations.

REASONS FOR DENYING THE WRIT

III. There is nothing unique about the Arizona Supreme Court decision that would justify this Court in accepting Petitioner's Petition for Writ of Certiorari. The Arizona Supreme Court decision is well-reasoned, and complies fully with prior United States Supreme Court decisions on the jurisdictional question and complies fully with Arizona law regarding the assertion of jurisdiction over non-resident defendants. It was a unanimous decision. The Arizona Supreme Court even left the door open for the Petitioner to continue its efforts to escape responsibility on jurisdictional grounds in the last sentence of its Opinion wherein Justice Feldman wrote "If future discovery indicates lack of jurisdiction, the trial court is free, of course, to make the appropriate order. . . . " (Petitioner's Appendix C, pages 26 and 27.)

The Arizona Supreme Court Opinion is a carefully reasoned one. In fact, Justice Feldman observed that

when deciding the application of *Asahi Metal Industry v. Superior Court*, 480 U.S. 102 (1986), the most restrictive interpretation of due process would be utilized. (Petitioner's Appendix C-12.) Justice Feldman correctly observed that the Petitioner's reliance on *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), was incorrect and factually misplaced. Justice Feldman correctly observed that the United States Supreme Court did not hold that Volkswagen, the manufacturer could not be sued in Oklahoma. In fact, the case proceeded not only against Volkswagen, the manufacturer, but against the importer as well. It was only a local distributor and a local dealership that was found not to have sufficient minimum contacts with the state of Oklahoma to confer jurisdiction.

Nor did the Arizona Supreme Court measure minimum contacts by the Defendant's present activities in Arizona. As Justice Feldman observed: "This case concerns jurisdiction over a manufacturer that *did not limit sales to any specific state.*" (Petitioner's Appendix C-13, 14) (emphasis supplied)

Justice Feldman relied upon Uberti's own written material in finding that Uberti was not only present in America, but had a world-wide presence. Justice Feldman noted that the Defendant's catalog stated that Uberti was the "best known producer of historical arms of all types in the world." (Petitioner's Appendix C-14, 15) Justice Feldman reasoned that the established contact between Iver Johnson and Uberti proved that Uberti manufactured the guns for Iver Johnson to Iver Johnson's specifications and that Iver Johnson was known to Uberti to be an American company serving the American market. It was

through this distribution channel that the Defendant Uberti exported its products from Italy to the United States by direction rather than chance. (Petitioner's Appendix C-14, 15 and 16)

This Court should keep in mind that the product in question is a finished product, not a component part. As Justice Feldman observed, the Defendant Uberti not only placed a finished product into a trade stream of its own choosing, but chose a distributor intending to penetrate the American market. (Petitioner's Appendix C-17)

Quoting from Justice O'Connor's comments in *Asahi, supra,* Justice Feldman found that designing the product for market in the forum state or marketing the product through a distributor who has agreed to serve as a sales agent in the forum state, was significant. He concluded that the facts of the case compelled the trial judge's conclusion that the product in question was designed for the western United States and knowingly marketed through a distributor to intentionally serve the United States of America. (Petitioner's Appendix C-18)

The Arizona Supreme Court correctly concluded that Iver Johnson's advertisements in national gun magazines and descriptions in the Defendant Uberti's catalog catered to an unrestricted nation-wide market that includes the state of Arizona. (Petitioner's Appendix C-22)

CONCLUSION

Petitioner's attempt to persuade this Court that there is a great conflict among circuits as to how to determine *Asahi* is of no moment. Justice Feldman in his decision pointed out that he was using the most restrictive standard used in *Asahi*. Resolving any perceived conflict among different circuits as to how to interpret *Asahi* cannot be accomplished in this case. The complained of "confusion" and different interpretations of that decision are not part of this case.

The decision of the Arizona Supreme Court is well-reasoned, is not in conflict with prior decisions of this Court, and does not raise any significant federal question. Petitioner's Petition for a Writ of Certiorari from this Court should be denied.

Respectfully submitted,

ROCKAFELLOW LAW FIRM

LEIGHTON H. ROCKAFELLOW
Attorney for Real Parties in Interest Cordova

APPENDIX A

DA GUNS DIGEST 1975

HANDGUNS – SINGLE ACTION REVOLVERS

IVER JOHNSON CATTLEMAN MAGNUM
Caliber: 257, 44 Mag., 45 LC, 6-shot.
Barrel: 4 3/4" 5 1/2", or 7 1/4", 44 Mag. avail. with 6", 6 1/4" or 7 1/4"
Weight: 2 1/2 lbs.
Stocks: Smooth walnut.
Sights: Fixed.
Features: Case-hardened frame, single action, blued barrel, brass backstrap and trigger guard, imported by Iver Johnson.
Price: 357, 45 LC. . . . $151.75 44 Mag. . . . $175.95

APPENDIX B

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

ROGER BAUGHMAN, Plaintiff, - against - IVER JOHNSON ARMS COMPANY, INC. and A. UBERTI AND C. CARDONE, INC., Defendants.	CU-80-05179

January 13, 1983
2:40 o'clock P.M.

DEPOSITION of Defendant, IVER JOHNSON ARMS COMPANY, INC., by LOUIS M. IMPERATO, taken by Plaintiff, pursuant to Notice dated December 22, 1982, held at the offices of Adler Reporting Service, 15 Park Row, New York,New York 10038, on January 13, 1983, at 2:40 P.M., before John D'Alessandro, CSR, a Notary Public of the State of New York.

. . .

P. 40

Q. Is it true that you were assured by Mr. Uberti when you started the distribution of these guns that they were a safe gun?

A. Yes.

Q. And that they could not be fired other than by pulling the trigger?

A. Yes.

Q. They couldn't be fired if they were dropped?

A. Right.

Q. You wouldn't have distributed the gun if you would have known if they would be fired when dropped; would you?

A. Exactly

. . .

P. 48

Q. Question on page 96 of this deposition says: "Did you in the course of inspections find guns which had to be rejected for various reason?

"Answer: Yes.

"Question: And returned to Uberti?

"Answer: Yes. I think what Uberti did was let his men do the repairs."

A. They came in, we saved them for them.

. . .

P. 50 and 51

Q. I am handing you Exhibit 3. Would you read that letter, please?

Mr. Hall: I will read it.

The Witness: Thank you.

Mr. Hall: Exhibit 3 is a letter of Ben Nero, Vice President, addressed to Aldo Uberti & Company, September 24, 1975.

"Dear Mr. Uberti: We have completed a study of Cattleman warranty repairs for the period September 1, 1974 to August 31, 1975. You shipped us 9118 Cattleman Revolvers, of which 1123 were returned for warranty repair, or a shocking 13%.

"Your quality is much worse than it was a year ago, and this after two price increases presumably justified by stricter quality measures instituted by you. We have lost many customers for the Cattleman because of the higher prices and poorer quality! With the company being poor, you have compounded our difficulties.

"We are billing you for 1123 repairs of $15.00 each, less the 1% agreed on and will deduct this bill from our next payment.

"1123 @ $15.00 ea.	$16,845.00
less 1% of $526,270.25 –	5,262.70
due Iver Johnson's	11,582.30

"The repairs listed are only the ones we have done here at Iver Johnson's; many of our distributors are repairing Cattleman themselves as a courtesy to their customers. We supply the parts at no charge and they do

the repairs. If all of these repairs were figured in, the figure we have presented would be drastically higher. Thirteen percent is bad enough, but with the outside repairs, the figures would be disgraceful!

Very truly yours, Iver Johnson's Arms, Inc., Ben Nero, Vice President.

"P.S. We have requested parts several times and have not received any – we won't be able to repair Cattleman very shortly!"

. . .

P. 52

Q. How long was it after the last letter in September of 1975 before you quit selling these guns?

A. I am not sure when that did occur, but I do know that Mr. Uberti did send some men over to repair the guns.

. . .

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOHN B. BROWNING and BETTY BROWNING Husband and Wife,	)	No. F-80-23 Civil
Plaintiffs,	)	
vs.	)	
IVER-JOHNSON ARMS, INC.; BERENSON HARDWARE; and PAY 'N SAVE CORP.,	)	
Defendants,	)	
and	)	
IVER-JOHNSON ARMS, INC.,	)	
Third Party Plaintiff,	)	
vs.	)	
ALDO UBERTI,	)	
Third Party Defendant.	)	

DEPOSITION UPON ORAL EXAMINATION OF
ALFRED THIBODEAU
1:20 P.M.
February 25, 1982
1610 Pacific Building
Seattle, Washington

HELEN M. POPELKA, Court Reporter

. . .

P. 164

Q. Now, when these guns came from Uberti, as I understand it, each one of them was packed in a separate box by Uberti?

A. Yes.

Q. And the boxes had the Iver Johnson name on them, did they?

A. Yes.

Q. Have you, yourself, ever met Aldo Uberti?

A. Yes, I have.

Q. Once or more than once?

A. More than once. He made many trips to Fitchburg, came over with his wife several times.

. . .

January 1982

Jurisdiction of Litigation	Counsel for Iver Johnson
Stanton v. I.J. & A. Uberti & Co. S/N 33336 .44 Magnum District of Montana, Missoula Div. Case No. CV-79-62-M	Dzivi, Conklin, & Nybo 104 Fourth St. North P.O. Box 1291 Great Falls, Montana 59403 406-727-7121 (Dick Dzivi)
Brumett v. I.J. S/N 26974 .44 Magnum State of Calif. County of Los Angeles Case No. C-292647	Amil Roth 1888 Century Park East Suite 120 Century City Los Angeles, Calif. 90067 213-277-7747

Baugham v. I.J. & A. Uberti & Co. S/N 22104 .44 Magnum State of New Mexico County of Bernalillo Case No. CV-80-05179	Rodey, Dickason, Sloan, Akin & Robb, P.A. 20 First Plaza, Suite 700 Albuquerque, New Mexico 87103 505-765-5900 (Ken Ferguson)
Browning v. I.J. Berenson Hardware, Pay 'N Save Corp. S/N 31633 .357 Magnum Case No. F-80-23 Civil District of Alaska	Merdes, Schaible, Staley & Delisio, Inc. 300 Barnette St. P.O. Box 810 Fairbanks, Alaska 99707 907-452-1855 (Dennis Cook)
Thomas v. I.J. S/N 42227 .44 Magnum Case No. ?	Ed Lamberty P.O. Box 1078 Dallas, Texas 75221 214-742-1156
Livesay Etc. v. I.J. & Uberti & Co. S/N 27032 .357 Magnum United States District Court Eastern District of Kentucky At Frankfort Action No. 81-28	Bennett, Bowman, Triplett & Vittitow 231 South Fifth St. Louisville, Kentucky 40202 502-583-5581 (Lee Sitlinger)

"Cattleman Revolvers"

Iver Johnson's has sold 22,536 single action Revolvers manufactured by Uberti from 1973 to 1978. Exhibit B1

Year	.357 Mag.	.44 Mag.	.22 Cal.	45 Long Colt
1973	356	1313	260	75
1974	2138	2980	490	1192
1975	2162	4453	304	1008
1976	492	2021	47	595
1977	763	1235	49	430
1978	173	-0-	-0-	-0-

APPENDIX D

STATE OF MARYLAND
COUNTY OF HARFORD

AFFIDAVIT OF LAMA S. MARTIN

Before me, the undersigned authority, personally appeared Lama S. Martin, who being duly sworn, deposes and says:

1. My name is Lama S. Martin.

2. I have appeared as an expert witness in matters involving firearms in courts of the State of Arizona and every other state except Hawaii, North Dakota and South Dakota. I have tested and analyzed firearms for over 32 years.

. . .

My examination of this revolver reveals that when the hammer is uncocked resting in the down position the firing pin protrudes through the breech face .062 inch. This is two times that required and makes this revolver much more dangerous when the hammer is uncocked and the gun is loaded. This excess protrusion is either a design defect or a manufacturing defect.

. . .

/s/
Lama S. Martin

Sworn to and subscribed before me this 27th day of July 1993.

/s/
Leslie A. Martin
Notary Public, State of Maryland
My Commission expires:
October 1, 1993